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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-972

UNITED STATES OF AMERICA,
Petitioner

v.

STANLEY APFELBAUM,
Respondent

BRIEF FOR RESPONDENT

JOEL HARVEY SLOMSKY
2400 Two Girard Plaza
Philadelphia, Pa. 19102
(215) 568-6188

Attorney for Respondent

PRESS OF BYRON S. ADAMS, INC., WASHINGTON, D.C.

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IN THE

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NO. 78-972

UNITED STATES OF AMERICA,
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v.

STANLEY APFELBAUM,
Respondent

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether the government is permitted unrestricted use of a grand jury witness' truthful immunized testimony at the trial of that witness for false swearing when such statements have not been charged as the *corpus delecti* of the false statements offense and have never been shown to be false by the government.

STATEMENT OF THE CASE

From 1974 to 1977 respondent, Stanley Apfelbaum, was employed as the Administrative Assistant to the then District Attorney of Philadelphia, F. Emmett Fitzpatrick. During 1976, a federal grand jury in the Eastern District of Pennsylvania was investigating potential federal violations stemming from a staged robbery on April 16, 1975 of a Chestnut Hill Lincoln-Mercury dealership in Philadelphia operated by Harry Brown and Marvin Greenblatt. During the course of the grand jury investigation, Mr. Apfelbaum was subpoenaed to testify to determine whether he was an aider and abettor or accessory after the fact to the staged robbery. Respondent invoked his Fifth Amendment privilege and on October 20, 1976 the United States District Court for the Eastern District of Pennsylvania (Broderick, J.) entered an Order under Title 18 U.S.C. §6002 immunizing Mr. Apfelbaum's testimony and compelling him to testify (A. 5-6). Respondent initially refused to testify, was held in civil contempt under 28 U.S.C. §1826 and confined for six days. Thereafter, on December 13, 1976 and January 3, 1977, respondent purged himself of the contempt by appearing before the grand jury and, pursuant to the immunity Order, answering the questions of his two interrogators from the United States Department of Justice. He was asked a wide range of questions about his knowledge of and relationship to Brown, Greenblatt and the automobile dealership.

In July, 1977, Mr. Apfelbaum was indicted by the federal grand jury and charged in two counts with knowingly making false material statements to the investigating grand jury, in violation of 18 U.S.C. §1623[1] (A. 7-19). The testimony alleged be false in both counts was very specific. Count One charged that Mr. Apfelbaum was not truthful when he denied trying to locate Harry Brown in Florida in December, 1975. The alleged false testimony contained in Count

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[1] Title 18, United States Code, §1623, reads in pertinent part as follows:

> "Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The same grand jury initially indicted respondent in April 1977 on three counts of making false declarations before the grand jury. Counts One and Two of the July, 1977 indictment contain the same testimony alleged to be false in Counts One and Two of the April, 1977 indictment. The April, 1977 indictment was dismissed by the district court because it failed to specify the materiality of Mr. Apfelbaum's testimony. Count Three also suffered from such vagueness that no conviction thereunder could ever be sustained (Pet. App. 7a, n.4).

At trial on the two counts contained in the July, 1977 instant indictment, the government established the materiality of respondent's testimony to the grand jury investigation through the testimony of the deputy forelady of the grand jury (Tr. 3-27, 31-32). The district court held as a matter of law that the pertinent questions and answers were material to the grand jury's investigation.

One given during respondent's December 13, 1976 grand jury appearance was as follows: (A. 13-14):

Q. It's my understanding you went down to Florida in December of 1975, approximately the 5th of December.

A. That's right. That's what I said before.

Q. Now, at that time did you see Mr. Brown?

A. No, I told you I went down there for a fishing trip, not fishing trip, to look at a boat for Dr. Slawek and then go to Puerto Rico.

Q. And you only stayed in Florida about three days?

A. About three or four days, something like that. I'm not sure exactly. Don't hold me to three or four. It was around that. I spent a total time of about two weeks between the two, including flight time and so on.

Q. When you were down there, did you call up Harry Brown and talk to him?

A. No.

Q. Did you know he was down there?

A. I heard he was down there. Somebody had said he was down there.

Q. Did you do anything to attempt to contact Mr. Brown when you were down there?

A. Not that I remember. I don't think I knew where he was at.

Q. Well, how did you find out where he was at eventually?

A. Somebody had told me about it and I don't know who, but they told me he was down in Florida.

Q. Okay. By this time, had the papers reported that Harry Brown was missing?

A. I don't believe so. I don't know. I'm not sure. I'm trying to recollect. I don't know whether they said he was missing or not.

Q. So, in December, when you were down there, you're sure you didn't try to contact Harry Brown; is that correct?

A. Yeah, yeah.

Q. Did you try to locate Harry Brown when you were down there?

A. No.

Q. You're sure?

A. Positive.

Q. Now, did you tell anyone that you were trying to locate Harry Brown in Florida?

A. Not that I remember.

Q. And, you know, you were on your vacation and you were looking at boats, so you weren't running around trying to find somebody you didn't know where they were, is that correct?

A. Yeah.

Q. And you would remember that?

A. Yeah, I think I would.[2]

[2] Before trial, respondent filed a Motion for a Bill of Particulars requesting the government to state specifically with respect to each count: a) which of the answers is the false declaration not believed to be true, and b) the particular facts on which the government relies in support of the allegations that the quoted portions of the testimony were false. The government never filed an answer to the Motion for a Bill of Particulars. However, at a pretrial hearing on August 25, 1977, the district court indicated upon inquiry of defense counsel that the specific answers alleged to be false in Count I are as follows (Tr. 26):

Count Two charged that Mr. Apfelbaum was not truthful when he denied telling F.B.I. agents that he had lent $10,000 to Harry Brown. The alleged false testimony contained in Count Two given during respondent's December 13, 1976 and January 3, 1977 grand jury appearances was as follows (A. 15-17):

(Testimony of December 13, 1976)

Q. Did you ever tell anyone that you had lent any money to Harry Brown or Marvin Greenblatt?

A. No, sir.

Q. Did you ever tell anyone that you had been involved in a loan to Harry Brown or Marvin Greenblatt?

A. No, sir.

Count I

Q. Did you try to locate Harry Brown when you were down there?

A. No.

Q. You're sure?

A. Positive.

Q. You never told anyone that you had been involved in any kind of loan to Harry Brown?
A. No.

* * *

(Testimony of January 3, 1977)
Q. Did you ever tell the F.B.I.—you denied last week that you told anyone that you had lent money to Harry Brown?
A. That's right.
Q. You denied that?
Q. How could I lend money when I don't have any money myself, Mr. Friedman?
Q. So, you didn't tell the F.B.I. or anyone that you had lent money to Harry Brown?
A. No, sir.
Q. Is that right?
A. That's right.

* * *

Q. Now, sir, in 19-- what, 1975, and 1976, did you have $10,000?
A. Did I what?
Q. Have $10,000?
A. I told you I didn't have $10,000.
Q. And, you didn't lend $10,000 to Harry Brown, is that right?
A. No, sir.
Q. And you testified that way last week?
A. Yeah.

Q. You testified last week that you never told anyone that you had lent $10,000 to Harry Brown; is that right?
A. That's right, sir.
Q. Okay. And, you still persist in that testimony.
A. Uh-huh. How can I lend it to him when I didn't have it? I had to go to the bank and borrow money myself.
Q. You still persist in that testimony?
A. Yes, sir.
Q. You never told the F.B.I. that you lent Harry Brown $10,000; is that right?
A. If I did, it was ridiculous.
Q. Did you tell them that?
A. I don't know. I don't think I did.
Q. Do you have any recollection of telling them that?
A. No, no, sir.[3]

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[3] At the same August 25, 1977 pretrial hearing, the court indicated in response to the Motion for a Bill of Particulars that the specific answers alleged to be false in Count Two are as follows (Tr. 19-20, 23, 49):

Q. So you didn't tell the F.B.I. or anyone that you had lent money to Harry Brown?

A. No, sir.

* * *

At trial, the government proved the falsity of the testimony contained in Count One with four witnesses from Florida (Tr. 135-139, 143-147, 148-153, 156-160, 164-170) and two bank employees from Philadelphia.

The evidence established that from December 5-10, 1975 respondent stayed at the Pier 66 Hotel in Fort Lauderdale, Florida and gave his address as the District Attorney's office in Philadelphia. Pier 66 is a hotel and marina complex in Fort Lauderdale which is known as the "Venice of America".

While in Florida, respondent visited the Blair Middle School located five miles west of Fort Lauderdale. His purpose was to find Harry Brown, the father of Lisa Brown, a student at the school. Mr. Apfelbaum first spoke with James Caplinger, a director of guidance and counselling, and displayed identification from the prosecutor's office in Philadelphia. School policy prohibited Caplinger from giving respondent information.

Q. You never told the F.B.I. that you lent Harry Brown $10,000; is that right?

A. If I did, it was ridiculous.

Q. Did you tell them that?

A. I don't know. I don't think I did.

Q. Do you have any recollection of telling them that?

A. No, no, sir.

Respondent next spoke with Joseph Grealy, an administrative assistant, who instructed his associate, Charlotte Walker, to look into the matter. At this point, respondent could not give a telephone number where he could be reached because he was on the run, not staying at one place, and was eventually going to Puerto Rico. Mr. Apfelbaum later explained the situation to Mrs. Walker, who called him back at Pier 66 and said she was unable to contact the Browns.

Claude Becker testified that he was an assistant treasurer of Advanced Mortgage Company, which made a V.A. mortgage loan to Harry Brown. In December, 1975, Mr. Apfelbaum telephoned him, said he was from the D.A.'s office in Philadelphia and requested information as to where he could reach Harry Brown. Becker declined to give out this information.

Philadelphia bank employees John Orem and John Scheuren testified that in early December, 1975 Mr. Apfelbaum informed them that he was taking a Florida vacation and would meet with Harry Brown (Tr. 189, 229).[4]

With regard to the second Count, two F.B.I. agents testified that on March 16, 1976 they interviewed

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[4] Over defense objection, the prosecution showed at trial that in February, 1975 Brown and Mr. Apfelbaum applied for a $10,000 loan through Orem, a banker with whom Brown was friendly. The loan was made in the name of the Philadelphia District Attorney and his wife (Tr. 204, 298). In March, 1975, $10,000 was credited to a checking account and the following

respondent, who said that on the previous Sunday, March 14, 1976, he returned from Fort Lauderdale, Florida where he met with Harry Brown. Mr. Apfelbaum also said he was in Fort Lauderdale in December, 1975 making inquiries as to the whereabouts of Harry Brown for the personal reason he loaned Harry Brown $10,000 and that he was a co-signer of a loan.[5] He also indicated that the loan arrangement was an "extremely complicated arrangement". Respondent was paying the loan himself and wanted to locate Harry Brown to get his money back (Tr. 300-308, 325-330).

In addition to offering this evidence to contradict Mr. Apfelbaum's specific testimony claimed to be false in Counts One and Two, the government introduced during its case in chief not only the false statements alleged in the indictment (A. 45-56, 32, 60, 62), but also, over defense objection, truthful excerpts taken from the transcripts of respondent's grand jury testimony of December 13, 1976 and January 3, 1977.

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week checks for $9,500 and $475 were drawn from the account and cashed by Brown (Tr. 226-229, 231-235). Thereafter, interest payments were made by respondent and about thirteen months later, the District Attorney himself repaid the loan (Tr. 231-235, 290).

[5] This testimony of the two F.B.I. agents was also relevant to the charges contained in Count One.

As summarized by the Court of Appeals, these excerpts included, *inter alia*:[6]

> "... (1) the degree of friendship between Apfelbaum and Brown (App. 96a-98a); (2) the circumstances surrounding Apfelbaum's discovery of, and visit to, Brown in Florida in 1976 (App. 107a, 110a, 124a-29a); (3) whether Apfelbaum and Brown discussed any loan transactions while in Florida (App. 112a); (4) whether Brown "patted down" Apfelbaum for weapons during his visit, or merely hugged him (App. 113a); (5) Apfelbaum's denial that he ever engaged in financial transactions with the Chestnut Hill dealership other than a $500 loan (App. 114a); (6) Apfelbaum's denial that he ever co-signed a loan for Brown (App. 115a); (7) a statement that Apfelbaum was introduced to one John Orem by Harry Brown (App. 116a) ..."

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[6] These excerpts appear in the Government's Appendix filed in this Court (A. 52, 57-61 and 64-67). "App." referred to by the Third Circuit are the pages of Mr. Apfelbaum's Appendix filed in the Court of Appeals.

At trial, the excerpts of respondent's grand jury testimony of December 13, 1976 introduced during the prosecution's case in chief were marked Exhibit G-1. The excerpts of respondent's grand jury testimony of January 3, 1977 were marked Exhibit G-2. The trial judge's copy of Exhibits G-1 and G-2 were marked Exhibits C-2 and C-3. These latter two exhibits contain, with a few exceptions (A. 20-21), a pink line in the margin reflecting the immunized grand jury testimony that respondent opposed the prosecution using at trial.

Other truthful excerpts introduced by the government over defense objection included respondent's testimony that Mr. Fitzpatrick never co-signed any loans for respondent, but that such loans were signed by himself or his wife (A. 38); that respondent attended a birthday party for Brown (A. 52); that Fitzpatrick was Brown's lawyer in the past (A. 67); and that respondent knew Brown because respondent would bring in the District Attorney's car to Brown's dealership for servicing (A. 68).

These various excerpts taken from Mr. Apfelbaum's immunized testimony were truthful statements made to the grand jury[7] and obviously relied upon by the government as substantive evidence to convict respondent. The jury found him guilty on both counts (A. 4) and the district court sentenced him to concurrent terms of two years imprisonment (A. 4).

The Court of Appeals reversed, relying not only on its earlier decisions in *United States* v. *Hockenberry*, 474 F.2d 247 (3d Cir. 1973) and *United States* v. *Frumento*, 552 F.2d 534, 541-543 (3d Cir. 1977) (en banc), but also upon the requirements of the Fifth Amendment to the United States Constitution and *Kastigar*

[7] The district court was under the mistaken impression that this testimony was false and was being introduced by the government to shown a pattern of deceit by respondent to prove he knowingly lied (A. 23, 78-79). The prosecution "doubted" the truthfulness of the testimony, but the record herein is totally devoid of any evidence to prove that such testimony was false.

v. *United United States*, 406 U.S. 441 (1972). The court held that grand jury testimony which is compelled under a grant of immunity may be utilized only as the *corpus delecti* or core of an indictment for perjury or for false swearing (Pet. App. 2a). *Corpus delecti* was defined to mean only the statement or statements of the defendant which the grand jury has charged to be perjurious, together with no more than that minimal testimony *essential* to place the charged falsehood into its proper context (Pet. App. 14a, n.9). (Emphasis in original). Any other use of testimony compelled under a grant of "use and fruits" immunity conferred under 18 U.S.C. §6002 would not afford the witness the same protection he would have received by invoking his privilege. Thus, "the proper remedy in the situation where the government believes that immunized statements are false is not to disregard the immunity grant but rather is to prosecute the perjurious witness" (Pet. App. 17a).[8]

[8] Respondent raised other points in support of reversal in the court of appeals, one of which related to a jury instruction on the mental state "knowingly", a critical element of 18 U.S.C. §1623. The district court here improperly instructed the jury that "unless the evidence points otherwise", a jury may infer that "one intends all the natural and probable consequences of an act". The use of this charge was disapproved by the Third Circuit in *United States* v. *Garrett*, 574 F.2d 778 (3d Cir.), *cert. denied*, 436 U.S. 919 (1978). A similar instruction was held to violate the Fourteenth Amendment's requirement that the State prove every element of a criminal charge beyond a reasonable doubt in *Sandstrom* v. *Montana*, ___ U.S. ___, 47 U.S.L.W. 4719 (June 18, 1979).

SUMMARY OF ARGUMENT

1. The Fifth Amendment broadly provides that no person shall be compelled to be a witness against himself in a criminal case. A witness who invokes the privilege can, nevertheless, be compelled to testify if he is granted "use or fruits" immunity in exchange for his testimony. To be coextensive with the constitutional privilege, a defendant's compelled statements may not be put to any testimonial use whatever against him in a criminal trial.

The purpose of affording the government the tool of immunizing a witness is to force him to testify truthfully. Thus, the government is precluded from making any use of truthful compelled testimony against the defendant at a criminal trial, or else the witness and the government are not in substantially the same position as if the witness had been allowed to remain silent. But for the immunity grant, the truthful testimony would not be in existence or available to the government to use against the witness. This insures that a witness has nothing to fear from telling the truth.

False immunized testimony has no Fifth Amendment protection whatever. Accordingly, a witness compelled to testify before a grand jury under grant of immunity who testifies falsely may be prosecuted for perjury or making false statements. The statements alleged to be false by the grand jury can be used for the limited purpose of being included in the

indictment as the *corpus delecti* or core of the false swearing charge.

Since the witness is being compelled to testify and may no longer rely upon his Fifth Amendment right to remain silent, the government has the burden of establishing the falsity of the grand jury testimony. In this case, the government never established that excerpts of respondent's compelled testimony used by the government substantively against him at trial were false.

2. The courts of appeals differ over the permissible uses of false compelled testimony. The court of appeals held in this case that the false testimony can only be used as the *corpus delecti* of a false swearing charge. Other courts of appeals have allowed the government to make broader uses of false compelled testimony at a criminal trial as, for example, to impeach the defendant or to show prior acts. Under any test of the permissible use of false compelled testimony, the failure of the government in the instant case to establish the falsity of portions of respondent's testimony read to the jury barred them from using such testimony against him in any respect. The use of such truthful testimony at trial violated respondent's Fifth Amendment rights requiring that a new trial be granted.

3. The legislative history of the false declaration and immunity statutes shows that the purpose of these two enactments was to encourage and induce

truthful testimony and to ease the prosecution for giving false testimony. This distinction between truthful and false testimony is consistent with the holding of the court of appeals which allows the government to prosecute a witness for testifying falsely, but bars them from ever using truthful testimony against the witness. Thus, the immunity grant is not disregarded and the perjurious witness is prosecuted.

ARGUMENT

RESPONDENT'S FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE GOVERNMENT INTRODUCED DURING ITS CASE IN CHIEF TRUTHFUL PORTIONS OF HIS GRAND JURY TESTIMONY COMPELLED UNDER A GRANT OF IMMUNITY TO PROVE THAT HE KNOWINGLY MADE FALSE STATEMENTS

A. Any Use of Truthful Immunized Testimony by the Government Against the Speaker Renders the Immunity Grant Less Than Coextensive with the Fifth Amendment Privilege It Displaces.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself". The privilege "assures that a citizen is not compelled to incriminate himself by his own testiminy, . . . [and] usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer". *Kastigar* v. *United States,* 406 U.S. 441, 461 (1972).

In *Tehan* v. *United States,* 382 U.S. 406, 415 (1966), the Court stated that:

> ". . . basic purposes that lie behind the [Fifth Amendment] privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load'."

In order to balance this Fifth Amendment requirement that the prosecution "shoulder the entire load" with the right of the grand jury to "every man's evidence" *United States* v. *Mandujano,* 425 U.S. 564, 571 (1976), the concept of "use and fruits" immunity evolved resulting in the promulgation in 1970 of 18 U.S.C. §6002, the federal immunity statute. In *Kastigar* v. *United States, supra,* the court held that immunity from "use and derivative use" under 18 U.S.C. §6002 was coextensive with the scope of the Fifth Amendment constitutional privilege against self-incrimination and was, therefore, constitutionally sufficient to compel testimony over a claim of privilege. As Mr. Justice Powell stated in *Kastigar* at p. 453:

> "Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." (Emphasis in original).

When a witness' claim of privilege is set aside under an order of immunity and he is forced to testify against his will, the exclusionary rule preventing the authorities from using the testimony or its fruits in any respect leaves the witness and the prosecutorial authorities in substantially the same position as if the witness has remained silent. *Kastigar* v. *United States, supra,* at 462; *Murphy* v. *Waterfront Comm'n.,* 378 U.S. 52, 79 (1964).

18 U.S.C. §6002 provides a "*total prohibition* or use" to insure "a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead', and also *barring the use of any evidence* obtained by focusing investigation on a witness as a result of his compelled disclosures". *Kastigar* v. *United States, supra,* at 460. (Emphasis added). By affording this kind of protection, the statute operates after the witness has given incriminatory testimony. Id. at 461.

In *New Jersey* v. *Portash,* ___ U.S. ___, 47 U.S.L.W. 4271 (March 20, 1979), the court held that a prosecutor may not use a person's legislatively immunized grand jury testimony to impeach his credibility as a testifying defendant in a criminal case. After reviewing *Kastigar's* broad statement of the necessary constitutional scope of testimonial immunity, the court said in Portash at p. 4273:

> "The Fifth and the Fourteenth Amendments provide that no person 'shall be *compelled* in any criminal case to be a witness against himself.' As we reaffirmed last Term, a defendant's compelled

> statements, as opposed to statements taken in violation of *Miranda,* may not be put *to any testimonial use* whatever against him in a criminal trial. 'But *any* criminal trial use against a defendant of his *involuntary* statements is a denial of due process of law.' (Emphasis in original). *Mincey* v. *Arizona,* 437 U.S. 385, 398." (Footnote omitted).

Despite the broad scope of "use" immunity, a witness may still be prosecuted under certain limited conditions. Two exceptions have arisen. First, a witness may be prosecuted for substantive crimes only if the government uses evidences derived from legitimate sources totally independent of the compelled testimony. *Kastigar* at 461. Second, a witness may be prosecuted "for perjury, giving a false statement or otherwise failing to comply with the order".[9] 18 U.S.C. §6002. Respondent contends that in these prosecutions a witness' truthful compelled statements "*may not be put to any testimonial use whatever against him*". *Portash, supra,* at p. 4273.[10]

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[9] As the government notes in its Brief at pp. 32, 33, n. 17, the language "a prosecution for perjury, giving a false statement or otherwise failing to comply with the [immunity] order" was not intended to constitute an exhaustive list of permissible uses of immunized testimony. Consistent with the Constitution, compelled testimony may be used in a variety of civil, as opposed to criminal, trials or proceedings. See, i.e., *In Re Daley,* 549 F.2d 469 (7th Cir.), *cert. denied,* 434 U.S. 829 (1977).

[10] The government argues in its Brief, pp. 10-13, that it often must use a witness' truthful responses in a proceeding to prove that other testimony was false and that the witness believed that

Prior decisions of this Court reveal a commitment to preserve the integrity of the truth-seeking process by encouraging a witness to testify truthfully. Prosecutions for false swearing were permitted even when the immunity statute in question contained no express exception for prejury. See, e.g., *United States* v. *Wong*, 431 U.S. 174, 1978 (1977); *United States* v. *Washington*, 431 U.S. 181, 189 (1977); *United States* v. *Mandujano*, 425 U.S. 564, 577-578 (1976) (plurality

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his testimony was false. The context in which a witness makes a false statement, it argues, might be relevant to the issue of whether a witness "knowingly" lied. In no case cited by the government in support of this argument was the issue raised herein even considered. As *Kastigar*, *supra*, and *Portash*, *supra*, implicitly recognize, however relevant immunized testimony might be to the government's case, its use against the speaker is absolutely barred in a criminal prosecution. The holding in *Portash* bars the use of relevant compelled evidence for purposes of impeaching a testifying defendant. This exclusion of relevant evidence otherwise not available to the government but for the immunity grant is in effect the trade-off made with the witness for supplanting his Fifth Amendment privilege. Note, *State* v. *Portash—Threatening Impeachment and Influencing Defendant's Decision to Testify: Prohibited Use of Compelled Testimony*, 31 Rutgers L. Rev. 815 (1978). The rule of exclusion is not unique to evidence gathered by means of the investigative tool of an immunity grant. For instance, in situations involving evidence illegally seized in violation of the Fourth Amendment or confessions coerced in violation of the Fifth Amendment, the exclusionary rule prevents the use of probative evidence. Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 Column. L. Rev. 674, 682 (1976).

opinion); id. at 584-585 (Brennan, J., concurring in the result); id. at 609 (Stewart, J., concurring in the result); *Glickstein* v. *United States*, 222 U.S. 139 (1911). False swearing "has no place whatever' in the "constitutional process of securing a witness' testimony". *United States* v. *Mandujano*, *supra*, at 576. "The Fifth Amendment privilege does not condone perjury; . . . [nor] endow the person who testifies with a license to commit perjury." *United States* v. *Wong*, *supra*, at 178; *accord*, *United States* v. *Knox*, 396 U.S. 77 (1969) (furnishing false information on a federal tax return in purported compliance with a statutory requirement is unprivileged.) *Bryson* v. *United States*, 396 U.S. 64, 72 (1969). ("Our legal system provides methods for challenging the government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and wilfully answer with a falsehood.") Cf. *Garner* v. *United States*, 424 U.S. 648 (1976).

In *Kahan* v. *United States*, 415 U.S. 239 (1974), the defendant, a former immigration inspector, was convicted of improperly receiving gratuities for official acts and perjury before the grand jury in violation of 18 U.S.C. §1623. At the defendant's arraignment, counsel was appointed to represent him after he requested the appointment and stated that he was without funds, whereas the truth was that he had substantial amounts of cash. At trial, the government introduced evidence of the defendant's statements to

the court as to his lack of funds. These *false* statements were admitted, *inter alia*, as evidence of wilfulness in making statements before the grand jury with knowledge of their falsity. The court of appeals reversed the conviction on the ground that the defendant in exercising his Sixth Amendment right to counsel necessarily was compelled to give up his Fifth Amendment right to remain silent. (See *Simmons* v. *United States*, 390 U.S. 377 (1968) regarding competing constitutional rights.) This Court reinstated the conviction and said at p. 243:

> "... *Simmons* barred the use of pretrial testimony at trial to prove its incriminating content. Here, by contrast, the incriminating component of respondent's pretrial statements derives not from their content, but from respondent's knowledge of their falsity .... The protective shield of Simmons is not to be converted into a license for false representations on the issue of indigency free from the risk that the claimant will be held accountable for his falsehood." (Footnote omitted).

In a dissenting opinion in *Kahan*, Justice Marshall foresaw the problem existing in the instant case—may truthful compelled testimony ever be used as incriminating evidence against the speaker in a criminal prosecution? As Justice Marshall said at length at pp. 247-249:

> "As I view the matter, this tension between the Fifth and Sixth Amendments could be resolved in one of two ways. The first alternative is to permit the defendant seeking counsel as an indigent to lie about his financial situation wherever the truth might be incriminating. As a second alternative, we could require the defendant seeking appointment of counsel to tell the truth at the indigency hearing, and subject him to sanctions for his willful and knowing failure to do so, but bar use of any incriminating information so revealed.

> "I, for one, do not consider the first alternative to be acceptable. Nor did the Court of Appeals in this case, for it conceded that if the defendant willfully misrepresented his assets at the pretrial hearing, he could be prosecuted for perjury or false statement.
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> * * *
>
> "The problem is not a frivolous one, but its solution does not lie, in my view, in permitting the defendant to perjure himself and remain free from sanction. Rather, it lies in procedures to ensure that the imposition of sanctions in appropriate cases will not in fact discourage good-faith assertions of Sixth Amendment claims. With respect to a subsequent perjury prosecution, the discouragement of legitimate Sixth Amendment claims is minimized by the requirement that the Government convince a jury that the defendant willfully and knowingly gave false testimony. I would provide a similar protection where the Government seeks to use a defendant's allegedly false pretrial statement as evidence against him at his pending criminal trial. Where such statement was purportedly given in furtherance of a Sixth Amendment right, I would bar the Government

from introducing it in evidence unless the Government proved and the trial court found that the defendant had knowingly and willfully provided false information.

"The solution, then to the tension between the Fifth and Sixth Amendments is to require the defendant seeking appointment of counsel to tell the truth at his indigency hearing, and to bar use of any incriminating information so revealed. This approach is fully consistent with our Fifth Amendment cases. '[A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant.' *Lefkowitz* v. *Turley,* 414 US 70, 78, 38 L.Ed. 2d 274, 94 S.Ct 316 (1973). Where the Government requires the defendant to speak in order to assert his Sixth Amendment rights, it must shelter him with the immunity provided by the Fifth Amendment for such compelled testimony."

Since the district court never made a finding that *Kahan* had wilfully misrepresented his financial situation, Justice Marshall felt the reversal of the conviction was proper.

Justice Marshall's resolution of the problem faced in *Kahan* should apply equally well in this case where the competing interests are the witness' supplanted Fifth Amendment privilege and the right of the grand jury to every person's truthful testimony. The sanction of the perjury statute will adequately punish false

testimony, and the prohibition against the incriminating use of truthful testimony will preserve the Fifth Amendment bar of compelling a person "in any criminal case to be a witness against himself".

This distinction was recognized by the Third Circuit Court of Appeals in the instant case and its precedents, *United States* v. *Frumento,* 552 F.2d 534 (3d Cir. 1977) (en banc); *United States* v. *Hockenberry,* 474 F.2d 247 (3d Cir. 1973). The facts in *Hockenberry* are similar to the facts in *New Jersey* v. *Portash, supra.* In *Hockenberry,* truthful immunized grand jury testimony was read to the petit jury and used to impeach the defendant at trial. In rejecting the prosecution's claim that an immunized statement could be used to discredit an individual as a witness in a subsequent prosecution even if the admission wes truthful, Judge Hastie said in *Hockenberry* at p. 249 as follows:

". . . a witness who testifies before a grand jury is required and sworn to tell the truth. The grant of immunity is superimposed upon that requirement. Protection is granted against future injurious use of the incriminating truth that the witness is required to speak, not against prosecution for or the use of any exculpatory falsehood that he may utter to avoid the required admission of wrongdoing. Hence, the immunity statute properly permits prosecution for perjury committed in an otherwise immunized statement and also the introduction in evidence of so much of the statement as is essential to establishing the *corpus delecti.*"

The Court of Appeals in this case defined *corpus delecti* more specifically to mean only the statement or statements of the defendant which the grand jury has charged to be perjurious, together with no more than minimal testimony *essential* to place the charged falsehood into its proper context (Pet. App. 14a, n.9). Beyond this use of immunized testimony, the government may not go. This resolution of the competing interests involved here insures not only that a perjurious witness is prosecuted, but also that the immunity grant is not disregarded[11].

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[11] The government claims that the holding of the court of appeals affords the witness broader protection than required by the Fifth Amendment. It argues in its Brief, pp. 16-19, 21, that the Fifth Amendment and immunity statute only prevent the use of information obtained to prove past crimes and that "if respondent had declined to testify before the grand jury on the ground that his testimony could be used against him if he should perjure himself, his claim of privilege would not be sustained" because perjury is a future crime. The latter argument was made by the government and rejected by an *en banc* court of appeals in *United States* v. *Frumento*, 552 F.2d 534 (3d Cir. 1977). The claim of privilege would fail not because perjury is a future crime, but because the immunity grant protects the witness against any future use of this *truthful* testimony. The immunity statute operates *after* the witness has given incriminatory testimony. *Kastigar* at 461. Future *false* testimony has never been protected. Moreover, neither the Fifth Amendment nor 18 U.S.C. §6002 on their face allow the government to use truthful immunized testimony to prove a future crime. Suppose the defendant in *Portash, supra*, was charged with a bank robbery or even perjury occuring a few years after he had given the truthful compelled

In the instant case, the government used substantively during its case in chief a number of truthful immunized statements made by respondent to prove the charges against him. This evidence would not have been in existence or available to the government to use against him but for the immunity grant. To be coextensive with the Fifth Amendment, "use and fruits" immunity must afford the witness the same protection he would have received had he invoked the privilege. The use of respondent's truthful immunized statements as incriminating evidence did not afford him the same protection as he would have received had the privilege been available and, therefore, resulted in compelling him in a criminal case to be a witness against himself. Since the prosecution did not "shoulder the entire load", respondent's Fifth Amendment rights were violated.

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testimony. The government's position would be that since the defedant is being prosecuted for future crimes, he could be cross-examined at the bank robbery or perjury trial with the prior truthful immunized testimony. In effect, at the trial of the future offenses, the government believes it would have the right to use the past compelled testimony for any purpose whatsoever. Respondent submits that such use of truthful testimony obtained under an immunity grant is equally prohibited because the immunity must afford the witness the same protection he would have received had he invoked the privilege. See, i.e., *United States* v. *Berardelli*, 565 F.2d 24, 28-29 (2d Cir. 1977) (truthful immunized testimony may not be used to prove an earlier or later perjury, but untruthful testimony may subject the witness to prosecution for perjury.)

B. The Failure of the Government to Establish the Falsity of Various Portions of Respondent's Immunized Grand Jury Testimony Prohibited It Under the Fifth Amendment From Using Such Testimony Against Him at Trial.

At trial, the government introduced in evidence the portions of the grand jury testimony alleged to be false in both counts of the indictment. The Count One testimony involved respondent's denial that he tried to locate one Harry Brown in Fort Lauderdale, Florida during the month of December, 1975. The Count Two testimony involved respondent's answers that he did not recall telling F.B.I. agents that he had loaned $10,000 to Brown.

In addition to this grand jury testimony, the government introduced during its case in chief a series of truthful excerpts of Mr. Apfelbaum's grand jury testimony. These excerpts covered a range of topics, including (1) the degree of friendship between Apfelbaum and Brown; (2) the circumstances surrounding Apfelbaum's discovery of, and visit to, Brown in Florida in 1976; (3) whether Apfelbaum and Brown discussed any loan transactions while in Florida; (4) whether Brown "patted down" Apfelbaum for weapons during his visit, or merely hugged him; (5) Apfelbaum's denial that he ever engaged in financial transactions with the Chestnut Hill dealership other than a $500 loan; (6) Apfelbaum's denial that he ever

co-signed a loan for Brown; (7) a statement that Apfelbaum was introduced to one John Orem by Harry Brown; (8) respondent's testimony that Mr. Fitzpatrick never co-signed any loans for respondent, but that such loans were signed by himself or his wife; (9) that respondent attended a birthday party for Brown; (10) that Fitzpatrick was Brown's lawyer in the past; and (11) that respondent knew Brown because respondent would bring in the District Attorney's car to Brown's dealership for servicing.

The prosecution argued in the lower courts that it "doubted" the truthfulness of portions of this testimony[12]. However, the record is devoid of any evidence to establish the falsity of any of this testimony. Respondent's suggestion to the district court that a "mini trial" would be necessary to determine the falsity of the compelled testimony not charged to be false in the indictment was rejected (A. 26). Without requiring the government to produce any supporting evidence to establish the falsehoods, the district court allowed the statements in evidence. There is no claim in this Court that the immunized testimony in question is anything but truthful.

Every court of appeals that has considered in various factual situations the government's claim that it

[12] The government also apparently conceded in the court of appeals the truthfulness of some of these excerpts, but argued that it was permissible to use them against appellant at trial anyway.

is permissible to make a variety of uses of *truthful* immunized testimony against the speaker in a criminal trial has rejected this claim. *Second Circuit: Shargel* v. *Lefkowitz*, 596 F.2d 42, 44 (2d Cir. 1979); *United States* v. *Berardelli*, *supra*, at 28-29; *United States* v. *Moss*, 562 F.2d 155, 165 (2d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); *United States* v. *Housand*, 550 F.2d 818, 823 (2d Cir.), *cert. denied*, 431 U.S. 970 (1970); *United States* v. *Kurzer*, 534 F.2d 511, 518 (2d Cir. 1976); *United States* v. *Tramunti*, 500 F.2d 1334, 1345 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974); *Third Circuit: United States* v. *Apfelbaum*, 584 F.2d 1264 (3d Cir. 1978) (instant case); *United States* v. *Frumento*, 552 F.2d 534, 542-43 (3d Cir. 1977) en banc); *United States* v. *Hockenberry*, 474 F.2d 247 (3d Cir. 1973); *Fifth Circuit: United States* v. *Partin*, 552 F.2d 621, 632 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977); cf. *United States* v. *Wilcox*, 450 F.2d 1131, 1140-41 (5th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972); *Seventh Circuit: United States* v. *Patrick*, 542 F.2d 381, 385-86 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *Tenth Circuit: United States* v. *Trammel*, 583 F.2d 1166, 1168 (10th Cir. 1978), *cert. granted*, No. 78-5705 (Feb. 2, 1979); *United States* v. *Dunn*, 577 F.2d 119, 125-126 (10th Cir. 1978), rev'd. on other grounds, No. 77-949 (June 4, 1979).

The difference in approach of the courts of appeals has been over the permissible uses of *false* immunized testimony which has no Fifth Amendment protection whatever. The most restrictive use of false compelled

testimony was set forth by the court of appeals in the instant case. The court held that other than as the *corpus delecti* or core of a perjury or false swearing indictment, the government may not use immunized testimony as substantive evidence. The Second Circuit would apparently permit *false* testimony not included as the *corpus delecti* of a perjury indictment to be used to impeach a defendant, or to be introduced during the government's case in chief, or to prove a prior act, or for other evidentiary pruposes. See, i.e., *United States* v. *Tramunti*, *supra*; *United States* v. *Moss*, *supra*.[3]

Regardless of whether the Second or Third Circuit rule covering the permissible uses of false immunized

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[3] Justice Marshall observed in the dissenting opinion in *United States* v. *Kahan*, *supra*, at pp. 247-48 as follows:

> "In view of [the Court of Appeals] concession that the defendant can be penalized for willfully and knowingly falsifying information at a pretrial suppression hearing, I cannot understand the Court of Appeals conclusion that this sanction can only take the form of a separate prosecution for perjury.
>
> "If the defendant's willfully false statement can be used against him at a subsequent perjury trial, I see no reason why it cannot be used against him at his pending criminal trial."

The court of appeals in this case had difficulty with such a broad use of arguably false immunized testimony only because a lesser burden than guilt beyond a reasonable doubt is apparently permitted to show that the witness knowingly made a false statement (Pet. App. 18a-19a, n.10).

testimony is followed in the instant case, respondent is entitled to a new trial. The government never established the falsity of the compelled testimony and, for this reason, was precluded from using it against Mr. Apfelbaum in any respect at trial.

The only real authority in support of the government's position is the limited dictum in *Cameron* v. *United States*, 231 U.S. 710, 720-721 (1914), where the court said that "in prosecutions for perjury the statute [Rev. Stat. §8600, 15 Stat. 37] saves the right to use such testimony for any legitimate purpose in establishing the charge made". This *dictum* was made in a case where the government attempted to prove the perjury of testimony given before a referee with immunized testimony given before a commissioner. The court held that under the applicable immunity statute the testimony given in the proceeding before the commissioner should not have been received to establish perjury in the proceeding before the referee. The *dictum* in question contains no supporting authority and, to be consistent with the Fifth Amendment, must be construed to mean that only *false* compelled testimony could be used for any legitimate purpose to establish the charges made. The court in *Cameron* never considered the constitutional question arising from the use of truthful, as opposed to false, compelled testimony. Consequently, the government's use of truthful testimony here violated the Fifth Amendment and the immunity grant.

C. The Purpose of the Enactment of the Federal Immunity and False Declaration Statutes Was to Compel the Production of Truthful Testimony Under Carefully Limited Controls to Protect the Fifth Amendment Privilege of the Witness.

The federal immunity statute, 18 U.S.C. §6002, and the false declaration statute, 18 U.S.C. §1623, were enacted as part of the Organized Crime Control Act of 1970, P. L. No. 91-452, §201(a), 84 Stat. 927. The immunity provisions were contained in Title II of the Act, while the false declarations atatute was contained in Title IV of the Act[14].

The combination of both statutes was aimed at encouraging reluctant witnesses to cooperate during investigations by providing truthful testimony. As Representative Poff, the chief sponsor of the bill in the House, stated in regard to Title IV (116 Cong. Rec. 35292):

> "By strengthening the inducement to tell the truth and correct falsehoods, and providing for the effective prosecution and punishment of those

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[14] 28 U.S.C. §1826(a), entitled *Recalcitrant Witnesses*, was enacted as Title III of the Act. This civil contempt statute enables a court to confine an immunized witness who refuses to testify after being ordered to do so by the court.

who give false testimony, title IV substantially improves the capacity of our courts to administer justice . . ."

The false declaration statute liberalized the existing evidentiary rules which made a conviction for perjury unlikely. It abolished the two-witness rule and permits contradictory statements under oath to be the subject of a perjury prosecution without the additional proof of falsity of one of the statements. One legislative goal was to encourage truthful testimony and to protect it. As Senator McClellan, the chief sponsor of the bill in the Senate, explained (115 Cong. Rec. 5880):

". . . *The law, moreover, ought to encourage not testimony, but truthful testimony. The existing rules run counter to this goal; perjury, not truth, is protected.*

* * *

"The existing rules are, in short, an unwarranted obstacle to securing legitimate perjury convictions. There is ample protection against spiteful retaliation in the traditional safeguards applicable to every criminal case. There is no good reason why perjury—at least before grand juries and courts—should not be treated like any other crime. *Sound prosecutive discretion* and *proof beyond a reasonable doubt of a judge and jury constitute ample protection against the unwarranted charge and conviction of perjury.*" (Emphasis added).

The congressional goal to ensure the truthfulness of immunized testimony, and to punish falsehood, is consistent with the position of the court of appeals in this case and that of the other circuits. The truth-seeking process is encouraged and false testimony penalized without infringing upon the supplanted Fifth Amendment privilege.

Accordingly, 18 U.S.C. §6002 and the Fifth Amendment should be interpreted not only to permit the use of false testimony in perjury prosecutions, but also to absolutely prohibit the use of truthful immunized testimony in criminal cases against the speaker.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

/s/ Harvey Slomsky
JOEL HARVEY SLOMSKY
Attorney for Respondent
Stanley Apfelbaum